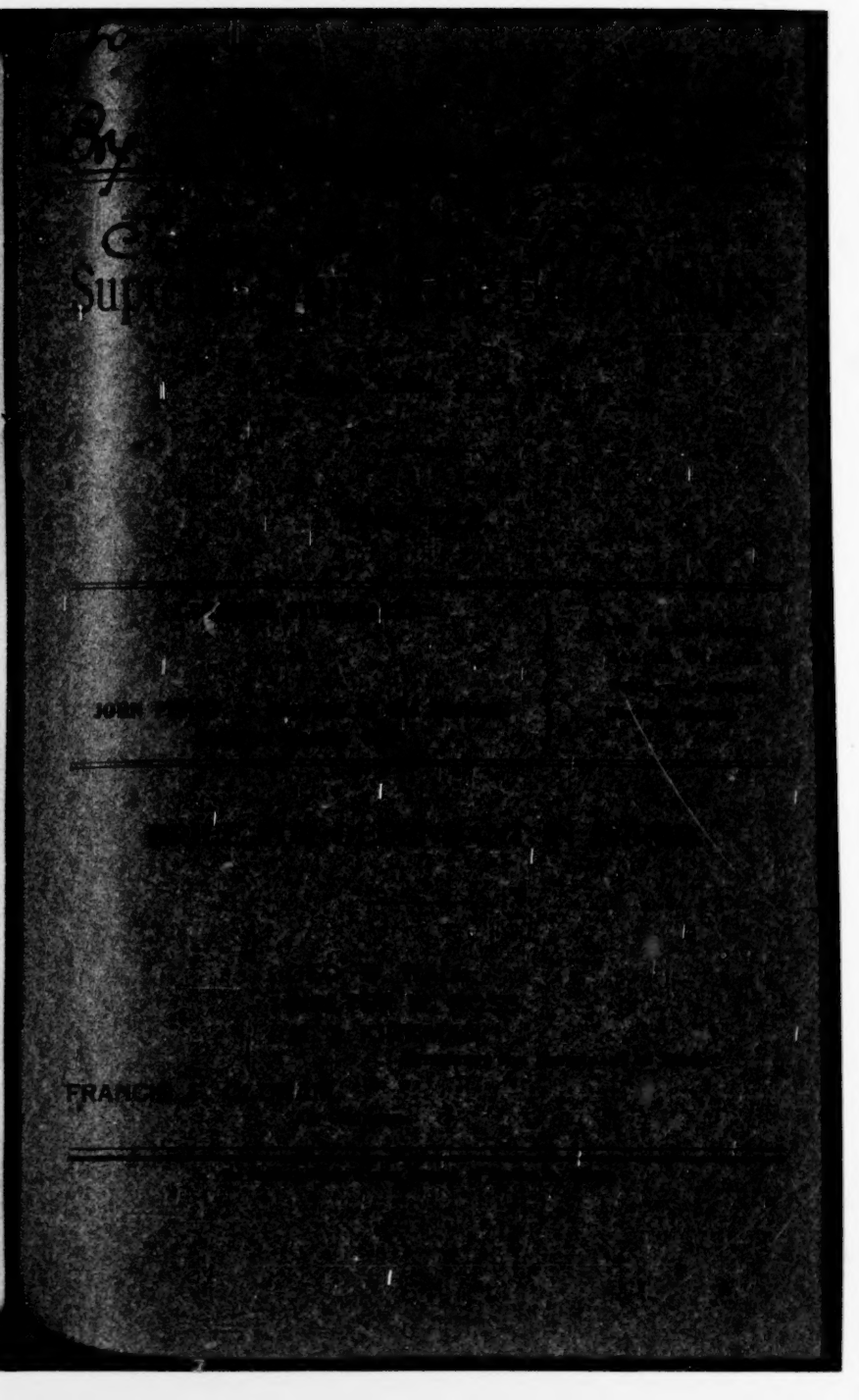

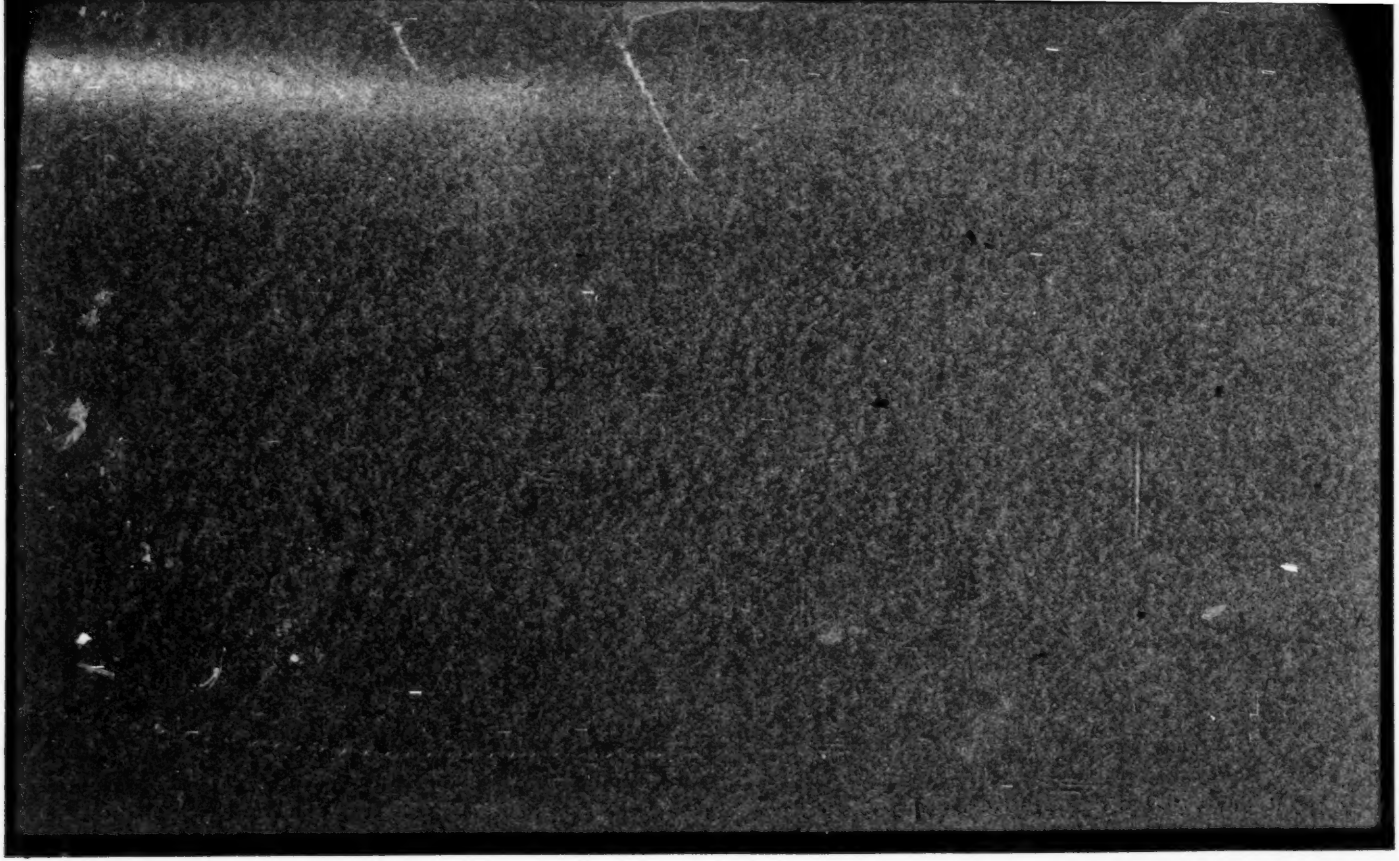

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

No. 122.

CLEMENT STUDEBAKER	Error to the United States Circuit Court of Appeals, Seventh Circuit.
vs.	
JOHN PERRY, as Receiver of the National Bank of Kansas City.	

STATEMENT.

This writ of error is prosecuted to reverse a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming a judgment of the Circuit Court of the United States for the Northern District of Illinois against the plaintiff in error for the sum of $1,323 and costs. The only question in the case is, whether the comptroller of the currency has the power to levy a second assessment upon the shareholders of an insolvent national bank when the two assessments do not exceed the statutory limit of the shareholders' liability.

The declaration filed by the defendant in error against

the plaintiff in error sets forth the incorporation of The National Bank of Kansas City; the insolvency of the bank; the appointment of plaintiff as receiver; the ownership by defendant of 189 shares of stock of the par value of $100 each; the first assessment by the comptroller of the currency of 16 per cent. on February 11, 1896; the payment of said assessment by defendant; a finding by the comptroller of the currency on the 25th day of February, 1899, that the first assessment was insufficient, and the necessity for an additional assessment of 7 per cent.; the levy of said second assessment; the direction by the comptroller to the receiver to collect it; and the refusal of defendant to pay. (Rec., 3–5.)

A demurrer to the declaration raises the question of its sufficiency in law. (Rec., 7.) The demurrer was overruled, and defendant electing to stand by his demurrer, judgment was rendered for the amount of the second assessment upon the stock owned by defendant. (Rec., 8.) A writ of error was allowed and the case was taken to the Circuit Court of Appeals of the Seventh Circuit, where the judgment of the Circuit Court was affirmed. (Rec., 16–18.) It is sought here to reverse the judgment of affirmance.

ARGUMENT.

The question presented by the record is whether the comptroller may make a second assessment upon a shareholder of a national banking association in the hands of a receiver. It is not complicated with any questions as to the proper mode of procedure to collect an assessment. The first assessment was voluntarily paid by defendant. There was no suit of any kind against him. As soon as the amount then deemed necessary to be paid by the stockholders was ascertained and declared by the comptroller of the currency, the defendant discharged his liability under that assessment by payment. By his demurrer he admits that the first assessment was insufficient—not large enough, had it all been collected—to pay the debts and liabilities of the bank.

He admits that he has paid only 16 per cent. of the amount of his stock; that he was originally liable for 100 per cent., if so much was needed; and that an additional 7 per cent. is necessary to pay the debts and liabilities of the bank. But he contends that the comptroller of the currency exhausted all his power to levy an assessment by a single exercise of that power. It is insisted that, although valid debts of the bank, for which he was liable, if necessary, to the full extent of 100 per cent. of the par value of his stock, remain unpaid, yet it was his good fortune that the necessity for a larger assessment than 16 per cent. was not apparent when the first assessment was levied, resulting in his absolute discharge from liability and the corresponding loss of the creditors of the bank. His contention, if correct, shows that the laws of the United States

relating to national banks are radically defective in not providing an adequate remedy for the enforcement of the liability of stockholders. This we respectfully deny.

The liability of shareholders in national banks is fixed by sections 5151 and 5152 of the Revised Statutes of the United States, which are as follows:

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders of any banking association now existing under state laws having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter Four of this title.

Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name."

The only statute expressly and directly providing for the enforcement of the shareholder's liability is section 5234, which is as follows:

"On becoming satisfied, as specified in sections 5226 and

5227, that any association has refued to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

Excerpted from the language providing for the other duties of the receiver, all that Congress has said, expressly relating to the remedy, is:

"Such receiver, under the direction of the comptroller, * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

Considered alone this language might seem to authorize the receiver under direction of the comptroller to bring suit to enforce the liability without any previous assessment. But considered in connection with the other duties provided for in this and other sections relating to winding up the affairs of an insolvent national bank it has been held that the comptroller has the exclusive power to determine what amount it is necessary for the stockholders to pay, and that suit can be maintaind by the receiver only after such levy of an assessment by the comptroller.

Kennedy v. *Gibson*, 8 Wall., 498.

The obvious purpose of the foregoing statutes is that the stockholders shall be liable for the full 100 per cent. of the par value of their stock, in addition to the amount invested therein, if it be necessary to pay the debts of the association, and that such full liability shall be enforced by the comptroller, who is charged with the execution of the law. The amount to be paid by them is the deficiency of the assets, and it is apportioned among the stockholders in the proportion which the stock of each shareholder bears to the whole capital stock of the bank.

U. S. v. *Knox*, 102 U. S., 422.

When this assessment is made it is the duty of the stockholders to pay it, and if they perform their duty as is contemplated by the statute, no suit of any kind is necessary. The courts are appealed to only to enforce the liability ascertained by the comptroller when the stockholders refuse to pay to the officer authorized to receive payment, the comptroller's receiver. In this respect there is radical distinction between the remedy provided for enforcing the statutory liability of stockholders in a national bank and the remedy against stockholders usually provided by the corporation laws of the states. In the latter case courts are the only instrumentality for enforcing the remedy. Judicial action is necessary to liquidate and fix the liability, as well as to collect it. Prior to a suit the stockholder can pay neither to the corporation nor to the creditor. All the stockholders are brought into equity. A receiver is appointed by the court. The amount necessary to be paid by the stockholders is fixed by the court. If it is not paid to the receiver when so ascertained and fixed by the court, he enforces payment, either in the original suit, or by an ancillary suit. The amount to be paid by each stock-

holder is fixed by an interlocutory decree of the court. If new and additional debts of the corporation are brought to light, or the assets shrink during the suit, or some of the stockholders prove to be insolvent (when they are sureties for each other), the court increases the amount to be paid by a second or third interlocutory decree; that is to say, *by successive assessments*, until the full statutory liability of the stockholders is exhausted.

Pollard v. *Bailey*, 20 Wall., 520.
Godfrey v. *Terry*, 97 U. S., 171.
2 Morawetz on Corp., Sec. 902.

But under the United States statutes relating to National Banks the *whole power* of ascertaining and fixing the liability is delegated to the comptroller. The judicial power of the Courts is limited to enforcing *payment* of the sum required by the comptroller.

The relative powers of the comptroller and of the courts were thus defined in the early case of *Kennedy* v. *Gibson*, 8 Wall., 498, above cited. In that case the receiver, by a bill in equity showing the necessity for an assessment against the stockholders of an insolvent national bank, applied to the court to *make* and enforce the assessment. On appeal to this court it was held that the power to assess the stockholders is vested exclusively in the comptroller. Mr. Justice Swayne said:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders can not controvert

it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount to be collected shall be formally ascertained. This would greatly protract the final settlement and might be attended by large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims.. Time will be consumed in the application of these tests, and the result in many cases can not be forseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying the demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

It seems to be clearly implied in the foregoing opinion that the comptroller may levy successive assessments as they may appear to be necessary. If the power can be exercised only once no reason is apparent why equity should

have jurisdiction for the collection of an assessment for less than 100 per cent. If the stockholders' liability is fixed once for all by the first assessment of the comptroller, the legal remedy for the collection of a 10 per cent. assessment is as full, adequate and complete as it is for the collection of the 100 per cent. assessment.

The reason why, when the assessment is for the 100 per cent., the proceedings *must* be at law, and when for a less amount it *may* be in equity, is obvious. When the full amount is assessed there can be but *one* suit against each stockholder. He is sued for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment, however, is made, *there may be other assessments*. Hence, while the receiver is at liberty to sue at law for even a partial assessment, equity has concurrent jurisdiction to prevent a multiplicity of suits.

Bailey v. *Tillinghast*, 99 Fed., 801, 805.

In a later case this court expressly recognized the power of the comptroller to levy second assessments. In *U. S.* v. *Knox*, 102 U. S., 422, a creditor sought by mandamus to compel the comptroller to levy a second assessment upon solvent stockholders to make good what could not be collected on the first assessment from insolvent stockholders. One of the most obvious defenses, if sound, was want of authority in the comptroller to levy a second assessment for any purpose. The court, however, refused the writ for the sole reason that stockholders are not sureties for each other, and say:

"Although assessments made by the comptroller under the circumstances of the first assessment in this case and *all other assessments, successive or otherwise*, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce

one made clearly and palpably contrary to the views we have expressed, it can not be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

Subsequently the power to levy successive assessments was directly involved in a decision by this court upon a motion to dismiss for want of jurisdiction.

In the Circuit Court of the United States a decree had been entered upon an assessment by the comptroller for an amount not sufficient to justify an appeal. But this court held that, as a *further assessment might be made*, the amount in controversy included the contingent liability, as well as the actual amount decreed to be paid by defendants, and on this ground denied a motion to dismiss the appeal.

Germanica National Bank v. *Case*, 131 U. S., Appendix CXLIV.

Unless the comptroller had power to levy a second assessment there was no ground for this court to assume jurisdiction in the case just cited. The amount called for by the comptroller and for which a decree had been rendered was insufficient to give jurisdiction on appeal. The right to an appeal necessarily involved the right of the comptroller to levy a further assessment. This ruling is decisive of the case at bar.

Repeated efforts have been made to induce this Court to recede from the construction placed upon the statutes conferring power upon the comptroller in *Kennedy* v. *Gibson*. It has been urged that the power to determine the necessity for an assessment upon stockholders and to fix the rate is judicial power, and can not constitutionally

be vested in an officer belonging to the executive department of the government. Such efforts have uniformly failed. In the latest case before this court in which this contention was made Mr. Justice White, speaking for the court, says:

"All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 674; *U. S.* v. *Knox*, 102 U. S., 423."

Bushnell v. *Leland*, 164 U. S., 684.

As the duty of making a ratable call on the stockholders is vested exclusively in the comptroller, if one assessment only can be made it follows that the only safe way of securing a sufficient amount is, either to call for the full 100 per cent. at once or to wait until all the assets of the bank are converted into money and all its debts ascertained. The former policy would be unjust to the stockholders, the latter to the creditors. The former policy would require in many instances a very large sum of money paid by stockholders to be locked up for years in the treasury of the United States, and returned to them without interest.

Indeed, it may well be doubted whether the comptroller has power to levy an assessment for a greater amount than appears to be necessary to pay the debts. The express

language of the statute is, that the receiver, under the direction of the comptroller, "may, *if necessary to pay the debts of such association*, enforce the individual liability of the stockholders." For the comptroller to levy the full assessment of 100 per cent. when a small per cent. only appeared to be necessary, would be a plain violation of the spirit of the statute, which is designed to protect the stockholder against unnecessary hardship. It was plainly not the intention of Congress that, upon a mere possibility of the 100 per cent. being required to pay the debts, the stockholders should pay it in cash as a sort of guaranty fund. On the other hand, if the comptroller waits until all the assets of the bank are converted into cash and all its liabilities exactly ascertained, there would be great delay, extraordinary expenses and frequent losses arising from the removal or insolvency of stockholders. In *Kennedy* v. *Gibson* the court say:

"It would be attended with injurious consequences to forbid action against the stockholders until the precise amount to be collected shall be formally ascertained."

We respectfully submit, therefore, that a reasonable construction of the statutes, empowering the comptroller to enforce the liability of the stockholders, requires that he should with reasonable diligence call for such an amount only as may appear to be necessary to pay the debts and liabilities of the bank; and that additional calls should be made as subsequent necessities arise, until the full statutory liability is exhausted.

Thus only can he use "the judgment and discretion" which this court in *Kennedy* v. *Gibson* say is given him by the statute.

With the single exception of *DeWeese* v. *Smith*, 97 Fed., 309 (reversed by *DeWeese* v. *Smith*, 106 Fed., 438), every case where the question has been considered sustains the power of the comptroller to levy successive assessments.

Aldrich v. *Yates*, 95 Fed., 78.
Aldrich v. *Campbell*, 97 Fed., 663.
Studebaker v. *Perry*, 102 Fed., 947.
DeWeese v. *Smith*, 106 Fed., 438.

In *Aldrich* v. *Yates*, 95 Fed., 78, the exact question was presented to the Circuit Court of the United States for the District of Kentucky. The court said, p. 80:

"The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock (section 5151), under the statutory conditions, if they are found by the comptroller to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition in the first instance to make an assessment unnecessarily large may well excuse its not being done, when there is certainly no statutory provision prohibiting, in terms, or by necessary implication, further assessments, if the necessity exists."

Aldrich v. *Campbell*, 97 Fed., 663, is a decision by the Circuit Court of Appeals of the United States, Ninth Circuit. Aldrich, receiver, had begun an action at law to collect a second assessment from Campbell, a stockholder. Campbell brought suit in equity to restrain the action at law on the grounds that the assessment was unnecessary and exceeded the jurisdiction of the comptroller. An interlocutory restraining order was granted, from which the receiver appealed. The court say, p. 665:

"It is admitted by the appellee that the comptroller's action in levying the first assessment was conclusive upon

the shareholders, but he contends that, under the facts stated, the second assessment was a wrongful and illegal one, and exceeded the jurisdiction of the comptroller."

The court quotes from *Kennedy* v. *Gibson* the passage quoted above herein; also cites *Casey* v. *Galli* and *U. S.* v. *Knox*, and says, on page 668:

"The comptroller has found the amount (of first assessment) insufficient to meet all the bank's liabilities, including interest on the debts of the bank accruing subsequent to the first assessment and the expenses of the receivership, and in accordance with the power and authority, judicial and executive, vested in him has levied a second assessment upon the shareholders. The authority to do this is not controverted even in the case just cited (the Knox case). On the contrary it is there said: Assessments made by the comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders."

And on p. 669 the court say:

"On the 30th day of January, 1899, the comptroller levied a second assessment, equally and ratably, on all the stockholders of the bank, at the rate of $17 per share, making a total for the two assessments of $82 per share. These two assessments, being together $18 less than the par value of the stock, were within the jurisdiction of the comptroller to make in the proceedings which he had instituted to wind up the affairs of the bank."

And it was accordingly held that although the bill alleged that the second assessment was unnecessary because the assets together with the first assessment were sufficient to pay the obligations of the bank, yet the court of chancery would not overrule the opinion of the comptroller on that point nor would it inquire into the matter, and permitted the receiver to proceed with a suit at law to collect a second assessment.

It is remarkable that neither in that case nor in the Knox case was it deemed a matter of argument that a second assessment was impossible because the first had exhausted the power. That would have been a very convenient answer to the position urged upon the court.

If the power was all exhausted by the first assessment then the second was void and would have been denied or stayed for that reason.

In the case of *Studebaker* v. *Perry*, 102 Fed., 947, now under review by this court, Judge Woods says in the opinion (Rec., 17):

"The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholders' liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design."

In *DeWeese* v. *Smith*, 106 Fed., 438, all the reasons which have been suggested why the comptroller has no power to levy a second assessment were fully considered by the Circuit Court of Appeals of the Eighth Circuit and pronounced unsound. The case in the Circuit Court differed from that now under consideration in that the defendant had been sued at law by the receiver of a national bank for the amount due under the first assessment and a judgment was rendered against him. (Here the defendant has voluntarily paid the first assessment.) A suit at law having been brought upon the second assessment, it was contended first that the judgment in the first suit was a

bar to a second suit, though upon a later assessment; secondly, that a single exercise of the authority to levy an assessment by the comptroller exhausted the power; and, thirdly, that the uniform practice of the department, prior to the term of the present comptroller, having been to levy but a single assessment, constituted a practical construction of the statutes which ought not to be disturbed by the courts. The Circuit Court sustained the defense upon each of the grounds contended for and rendered judgment against the receiver (97 Fed., 309). The judgment was reversed by the unanimous decision of the Circuit Court of Appeals.

In the case at bar no question as to the effect of a former judgment is involved. The defendant having voluntarily paid the first assessment, the sole question is, has the comptroller power to levy a second assessment? If the power is lacking it is either because the power to levy assessments is exhausted by one exercise of it or because a continuous refusal or neglect by comptrollers for many years to exercise the power of levying a second assessment has deprived subsequent comptrollers of the power, or for both these reasons.

The comptroller is vested with a general power, with a general object in view. It is not said in the statute that he shall make one effort to enforce the liability, but broadly that he may enforce the liability, which may involve many efforts.

By what canon of construction shall we add "but he shall make only one assessment"?

To repeat somewhat; in *Kennedy* v. *Gibson* it was dis-

tinctly ruled, for reasons given, that the comptroller must act promptly, must not wait until the assets of the bank have all been collected and reduced to money, and that he must exercise his best judgment as to how much will be required from the shareholders. Now, if he must act without delay and must use such discretion, it follows, as a necessary consequence, that he may make a second assessment, if the first is insufficient.

Otherwise he will be compelled for the sake of safety to levy the whole amount at once, although, according to his best judgment from his then standpoint, it will not be necessary to call for half of it, or even a tenth; but because the assets may shrink to nothing from the insolvency of debtors, the intervention of legal defenses, the failure of titles, and other causes, he must call for the whole. Thus, if he can make but one assessment, he is absolutely prevented from exercising any judgment or discretion whatever as to how much is necessary. And so the element of discretion and judgment on his part would be entirely eliminated.

That the law does not contemplate, and that this court does not mean, by the language used in *Kennedy* v. *Gibson* and in *Germanica National Bank* v. *Case*, that, when a partial assessment is once made by the comptroller, further assessments, if necessary, can only be made by a court of equity in a suit pending on the original assessment, is also obvious from the fact that such a construction of the law implies that the stockholders may prevent a second assessment by paying the original partial assessment. The assumption is that if the stockholders, when partially assessed, promptly pay the assessment, no further assessment can be made on them.

Now, if that would be a good answer in a suit at law upon a second assessment, why would it not be a valid objection to a second assessment in a suit in equity?

If a court of equity or the comptroller can make a second assessment only in a pending suit in such court, the statute has provided for a 100 per cent. liability which can be enforced only when the stockholder wrongfully refuses to pay a partial assessment, or when the comptroller assesses the full amount at once. When a position leads to an absurd conclusion it is untenable.

Any construction of the statutes which requires the interposition in any manner of a court of equity to make or justify a second assessment seems to overlook the fact that the *power to assess* belongs exclusively to the *comptroller*, and the power to *enforce the assessment* to the *courts*. Such construction confuses the remedy provided by this statute of the United States with the ordinary remedy for the enforcement of the statutory liability of stockholders by the courts.

To hold that the comptroller must make the first assessment—must decide whether the whole or a part shall be collected—because the statute has referred this question to his judgment and discretion, but that a court of equity must make, or assist in making, the second assessment, we respectfully submit, is plainly inconsistent. There is nothing in the statute or in the decision of the courts to indicate that the whole power of assessing the stockholders is not vested in the comptroller.

Whether a single exercise of quasi-judicial power conferred by the legislative department of government upon an executive officer exhausts such power depends entirely on the nature and extent of the power so conferred.

There is a clear distinction between cases where some single *particular act* involving judicial discretion is to be performed by an executive officer and cases where the whole matter requiring repeated exercise of discretionary power is committed to his jurisdiction. The authorities relied upon by plaintiff in error are all cases where the quasi-judicial power was limited to a single act, as in *Germaine* v. *Waggoner*, 1 Hill, 279. In that case a statute of New York directed canal commissioners to make surveys, levels and estimates for a canal and *to adopt a plan*. After the plan had been adopted and the work done, the commissioners undertook to raise the height of a dam six inches, whereby the plaintiff was injured. The court say:

"Had the statute stopped with a general authority to construct and complete the canal, the power to authorize the raising of any dam in the outlet at any stage of the work would be implied."

The case, also relied upon, of *People* v. *Board of Supervisors of Schenectady*, 35 Barb., 408, is of a similar nature. The supervisors were clothed with power to apportion a tax to be raised among the several towns and wards of the county as seemed to them equitable and just. It was held that after the apportionment had been made and recorded by the clerk the power of the supervisors was exhausted. On page 416 the court say:

"Where a judicial body is limited to a single act, by the performance of the act their power becomes *functus officio*."

These cases clearly do not apply to the quasi-judicial power of the comptroller, who has the exclusive charge of insolvent national banks. He is clothed with the general power and duty of assessing the stockholders to the full extent of their liability.

The comptroller's power is more nearly analogous to

that of the water commissioners for the City of New York, who, under an act for supplying the City of New York with water, were authorized to enter upon land for that purpose, and in case of disagreement with the owner as to the value, appraisers were to be appointed by the vice-chancellor to assess the value of land required. It was held that, after the commissioners had taken what they deemed sufficient land and the assessment had been made, they had power and authority to take additional land on being convinced that an insufficient quantity was taken by their first judgment.

In re Water Commissioners, 3 Edw. Ch., 552.

In this connection it was also argued in behalf of plaintiff in error that the liability is single, indivisible and cannot be split, so as to constitute more than one demand or cause of action. The liability here involved is not to be likened in the matter of singleness or indivisibility to the ordinary case of liability upon contract or tort.

Not one of the cases cited is like this, as will be seen upon the barest reference to them, and they cannot in any fair sense be regarded as in point here. The liability under consideration is imposed by statute for the security of creditors.

It is for "all debts, contracts and engagements" of the bank, and is to the extent of the amount of stock held by the shareholders equally and ratably, and not one for another. It is not a primary liability, but arises upon ascertaining that the assets of the bank are not equal to its indebtedness.

It is not for a fixed and definite sum; it may be more

or less, not exceeding the limit, and is ratable among the stockholders.

The comptroller is empowered to enforce it, and in order to do so he must first ascertain it, and he must do this in advance of the collection of the bank assets, which implies that his ascertainment must be merely an approximation. The liability is contingent, depends upon how much is needed, and is not unlike a subscription for corporate stock, in that it is payable when called, when assessed. It is not all due at once, nor is any of it due until the need appears.

Even after it is paid upon an assessment, whatever is not required must be refunded.

Its leading characteristics distinguish it from the ordinary, definite, absolute liability growing out of contract or tort, and to say that it is like such liability in the respect contended for seems to confuse terms and ideas and to ignore essential differences.

The rule contended for is not universal even in respect to contracts, though it is general. For instance, the case of rent where the title of joint lessors is severed; the lessee must pay each owner according to his proportion; and where the lessor dies, the rent subsequently due will be apportioned to the heirs or devisees and each may sue for his share. This exception arises from the necessity of the case and is familiar.

Certain bank charters in Illinois provided that "when default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively," and it was repeatedly held that an action at law would lie

against each stockholder at the instance of a single creditor.

Schalucky v. *Field*, 124 Ill., 617, and cases cited.

In one of the earlier cases, *Culver* v. *Bank*, 64 Ill., 538, it was said:

"It is no objection that the stockholder may be subjected to several suits, as he can in no event be answerable for more than the amount of his stock."

The provision in these charters is not very different from the provision of section 5,151, and it was held to create a primary liability not dependent upon an adjustment of the affairs of the bank.

In this respect section 5,234 introduces the modification of *necessity* when liability is enforced by the comptroller, yet the general character of the liability, in being for *all* debts and engagements of the bank, is similar. The feature of successive demands recoverable at law until the whole liability is exhausted is common to both cases, and the answer to the objection above quoted is applicable here.

It seems quite inappropriate to quote the maxim that no one shall be twice vexed for one and the same cause. It is not one and the same. The law merely provides that the shareholder shall pay what may be necessary to meet the deficit. How much that is cannot be ascertained with certainty at once, but as it is important that liquidation shall progress without delay, it is just to him that he be called for no more than seems to be necessary, and it is just to the creditor that further calls may be made when necessary. In the very nature of the case this contingent liability is subject to be drawn upon

from time to time as needed, until exhausted. Any other view involves a judicial restriction upon general terms with the unfortunate result of unnecessary hardship to the stockholder, or unnecessary risk of loss to the creditor.

The fact that it had been the practice of the comptroller's office for many years to levy but a single assessment is relied upon as an argument against the power to levy more than one assessment. The principle is invoked that,

"The construction given to the statute by those charged with the duty of executing it ought not to be overruled without cogent reasons."

That there were cogent and sufficient reasons for changing the practice of the comptroller's office in this respect cannot be more clearly shown than by a reference to the report of the comptroller of the currency for the year 1898. Vol. 1, p. XXXVI *et seq.* Stating the former practice, the change made, the reasons therefor, with illustrations of the practical results under the former and present rulings of the office; from which it will be seen that the experience of the office dictated a change and that the subject received very careful consideration and thoughtful treatment in the light of such experience.

The report says in substance that the former practice of the office, which was to regard the levy of an assessment as irrevocable and unchangeable notwithstanding subsequent developments, demonstrated error therein had been found in many cases to be inconsistent with the fulfillment of the law: that if an ordinary trustee representing two parties to a settlement is charged with the collection of a debt

from one to the other after collecting what he believes to be due finds he has not collected enough it would be his duty to collect the balance; and on the other hand if he found he had collected too much he should return the overplus, and that the comptroller should be governed by these rules in making assessments upon shareholders; that the assessment being made generally before the final liquidation of the assets it is difficult to estimate with accuracy in advance how much will be required owing to various contingencies, and that errors therein are inevitable and unavoidable, making a second assessment indispensable in many cases. After stating these matters somewhat in detail the report quotes from the opinion of this court in the case of the *United States* v. *Knox*, *supra*, and reaches the conclusion that the comptroller should exercise the power of review, for the purpose of making an additional assessment when necessary, and for the purpose of returning any excess that may equitably be due to shareholders.

Instances are then cited, and these with figures in detail illustrate the situation in numerous cases, and demonstrate the propriety of the position taken.

Thus the comptroller having found that the former practice led to unsatisfactory results undertook to correct it and to proceed thereafter upon the line which reason and experience demanded.

Now it is argued that the former practice could not be changed because it had placed a construction upon the statute which the courts must enforce, and in doing so must overrule the action of the comptroller, which action, the argument implies, would be proper but for the former practice.

Let it be conceded for the sake of argument that former comptrollers of the currency were of opinion but one assessment could be made, and that the practice was changed by the present comptroller; the question is whether he was bound by the views of his predecessors.

Plainly stated, the proposition is that because former comptrollers entertained a certain opinion as to the proper administration of the office he must entertain it also and follow it regardless of consequences; he is bound by previous rulings; an erroneous, unjust, unwise course heretofore pursued must be continued, and not only so, but the courts will decline to read the law for themselves, and will implicity observe the so-called precedent and enforce obedience thereto. And this, by reason of a supposed application of the doctrine of contemperaneous and practical construction. What is that doctrine?

It is discussed somewhat fully in Cooley on Constitutional Limitations (5th Ed.), Sec. 67 *et seq.* Referring to the practical construction of a constitutional provision, the author says:

"And when this has been given by officers in discharge of their official duty and rights have accrued in reliance upon it which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight."

Later on, Sec. 69:

"If the question involved is really one of doubt the force of their (officers') judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow intrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical

construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmaker";

And then quotes from Story on Const., 407:

"Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."

He proceeds to say that this, the true and only safe rule, appears upon first reading not to have been followed in all the reported cases. After examination of some of these he concludes:

"We think we allow to contemporary and practical construction its full legitimate force when we suffer it where it is clear and uniform to solve in its own favor the doubts which arise on reading the instrument to be construed."

So in Sedgwick on Statutory Law, 251:

"*Contemporaneous Exposition*—In seeking aid to construe an obscure or doubtful statute, considerable weight is attached to the opinions in regard to it entertained by persons learned in the law at the time of its passage."

The author then considers legislative exposition, judicial construction and usage, and quotes (page 256) from a New York case:

"Lord Coke's expression that common opinion is good authority in law does not apply to a mere speculative opinion in the community as to what the law on a particular subject is; but when such opinion has been frequently acted upon and for a great length of time by those whose duty it is to administer the law and important individual rights have been acquired or are dependent upon such practical construction of the law, this expression of the learned commentator upon Littleton is entitled to great weight."

In Am. & Eng. Ency. of Law, Vol. 23, page 342, it is said:

"This rule of usage followed in the interpretation of a

statute has been said to apply only to cases where the language is ambiguous: When it is plain and unambiguous it is said that a practical construction in conflict with it must be corrected. * * * The construction of a statute in accordance with established practice will be especially followed by the courts in cases where departure from such construction would result in great mischief or where property rights would be disturbed."

In *U. S.* v. *Graham*, 110 U. S., 219, it is said:

"Such being the case it matters not what the practice of the department may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation; if there were ambiguity or doubt then such a practice begun so early and continued so long would be in the highest degree persuasive, if not absolutely controlling, in its effect; but with language clear and precise and with its meaning evident there is no room for construction and consequently no need for anything to give it aid."

In Illinois a leading case is *The People &c.* v. *Loewenthal*, 93 Ill., 191, involving the validity of a bank charter. An extract from the text of Cooley, above referred to, was quoted, and it was held that as the point was difficult and as important rights had accrued upon the faith of the contemporary construction of the constitution which supported the particular charter and many others like it, the argument *ab inconvenienti* should have great weight.

It will be seen that though there may have been loose and general expressions in some of the cases, yet the true rule is that contemporary or practical construction will be resorted to merely as *an aid* when the statute is *doubtful or obscure*, and then only for the purpose of *saving important rights*, built up or acquired on the faith of such construction. A leading case, cited in all the books, is *Rogers* v. *Goodwin*, 2 Mass., 447, where the title to large and valu-

able estates in various parts of the commonwealth were affected, and would have been disturbed by disregarding a certain construction which by long usage had been placed upon an ancient colonial statute; and great weight was there given the argument *ab inconvenienti*, which turned the scale in the judicial mind.

In the case at bar there is no obscurity or ambiguity, and no rights have been acquired upon the faith of the supposed practical construction, which would be disturbed or injuriously affected by a change in the practice of the department. Thus, each of these elements which are always considered in resorting to the aid of such construction is wanting.

On the other hand, however, the practice adopted by the present comptroller is to make asesssments according to the apparent necessity at the time, with the purpose of making others should a change in the situation disclose the necessity therefor.

Should it now be held because of the former practice one assessment exhausts the power, it will happen that many creditors will receive less than their dues, while many shareholders will have paid less than their liability, and under such ruling they can escape further payment.

Thus an artificial rule of construction will be perverted in its application so as to produce that kind of injury which it was specially devised to prevent.

Finally, it must be observed, as readily occurs to the mind at first, that usage or practical construction is invoked only for the purpose of *sustaining* some rule or regulation the validity of which is in issue. The argument always is: This interpretation should be followed because it is in accordance with settled practice, and since

the statute is difficult of construction and since rights have accrued which would be disturbed by a change, let the consideration, *ab inconvenienti*, turn the scale, and the official construction stand as law.

But here the effort is to *overrule* a well-considered construction adopted by the department, and to set *aside* its action based thereon. The reason assigned is that formerly the department took a different view of the matter; therefore, that view (which the argument must concede has no support except its antiquity) shall prevail, and abrogate any other. A confessed error must be perpetuated. An admitted wrong can never be corrected.

We submit that this is an attempt to prostitute the rule to a purpose never designed and to which it is not adapted.

That a continuous and uniform practice by officers in executing a statute should receive the respectful consideration of courts in the construction of such statute is well settled. But the principle has no application to a case where the executive department itself inaugurates a reform. The presumption is that the change was made in the light of experience, after full consideration and for good cause. Other things being equal later decisions are entitled to greater weight than earlier ones. The comptroller's department has simply overruled its former decisions. An overruled authority is at a discount when the overruling tribunal is of superior or co-ordinate rank.

It is respectfully submitted, therefore, both on reason and authority, that the power to determine the necessity of assessing the stockholders of an insolvent national bank and to fix the amount to be paid by them within the limits of their statutory liability having been vested in the comptroller of the currency, should be freely exercised by

that officer with due regard to the rights of creditors and shareholders. The main object of the statute should be kept in view; that is, the liability of the shareholder and the security thereby afforded. This legislation affects a most important interest. It was designed to protect as far as possible the creditors of national banks, and thereby to strengthen the system, and should be so construed as to promote that design.

Canons of construction are useful merely to ascertain the intent of the law.

The intent here is not in doubt. There is no need to invoke technical rules nor is there occasion to add anything to what is expressed.

A plain measure of liability is imposed, with a clear power to enforce it as far as necessary without limitations or restrictions as to methods. Far-fetched and inapt analogies should be disregarded.

There is nothing in the situation of creditor or shareholder or in the terms of the law, making it fit or appropriate that the assessment should be for the full amount when not apparently required, or forbidding a subsequent assessment when the first is for any cause not sufficient.

The judgment should be affirmed.

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